ORIGINAL

No. 94-8729

DISTRIBUTED MAY 10 1995

Supreme Court, U.S.
FILED
MAY 10 1995
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

STEFAN B. HERPEL, P.C.
Stefan B. Herpel
206 S. Fifth Ave., Suite 200
Ann Arbor, MI 48104
(313) 930-0852
Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTRODUCTION 1

JURISDICTION 1

REASONS FOR GRANTING CERTIORARI 6

CONCLUSION 8

TABLE OF AUTHORITIES

Cases

Austin v. United States, 509 U.S. ___, 125 L. Ed. 2d 488 (1993) 7

Calero-Toledo v. Pearson Yacht Leasing Co.,
416 U.S. 663 (1974) 1, 3

Dobbins Distillery v. United States, 96 U.S. 395 (1877) 3

Harmony v. United States, 43 U.S. (2 How.) (1844) 3

In re Forfeiture of $53.00, 444 N.W.2d 182 (1989) 4

Michigan v. Long, 463 U.S. 1032 (1983) 5, 6

People v. One 1979 Honda Automobile, 362 N.W.2d 860 (1984) 4

The Palmyra, 25 U.S. (12 Wheat.) 1 (1827) 3

United Air Lines v. Mahin, 410 U.S. 623 (1973) 2

United States v. The Little Charles, 26 F. Cas. 979 (1818) 3

Van Oster v. Kansas, 272 U.S. 465 (1926) 3

Treatises

Stern, Gressman, et al., Supreme Court Practice (7th Ed. 1993) 6

INTRODUCTION

Respondent's brief in opposition to Tina Bennis' petition for a writ of certiorari makes two principal arguments against granting the writ in this case. The State of Michigan (acting through the Wayne County Prosecutor) argues that this Court has no jurisdiction over this case because the decision relied on both state and federal cases in concluding that the Michigan nuisance statute--and the application of that statute to forfeit Tina Bennis' interest in the Bennis automobile--were constitutional. The Wayne County Prosecutor also contends that the very absence of an innocent owner exemption in the statute is a factor that militates against the grant of certiorari, assuming there is jurisdiction.

Respondent does not take exception to petitioner's contention that the constitutional limits to civil forfeiture generally, and the rights of innocent owners specifically, are issues of vital importance, as demonstrated by several recent decisions of this Court. Nor does the Wayne County Prosecutor challenge petitioner's analysis of the errors in the Michigan Supreme Court's constitutional analysis. Finally, respondent does not disagree with petitioner's contention that the Michigan Supreme Court decision is in direct conflict both with dicta in the United States Supreme Court's Pearson decision and a number of federal circuit and state supreme court decisions that have applied that dicta. Tina Bennis will therefore confine her discussion in this reply brief to the two principal arguments advanced by the Wayne County Prosecutor.

JURISDICTION

Respondent's jurisdictional arguments do not take exception to--and indeed implicitly acknowledge--the thrust of Tina Bennis' explanation of the basis of this Court's jurisdiction.

The Michigan Supreme Court opinion upholding the forfeiture was a plurality opinion joined by three justices; a fourth justice, Justice Griffin, joined in the result only, without writing separately. Petitioner demonstrated that Justice Griffin necessarily had to reject her constitutional claim in order to support the result reached in the case. (Petition for Certiorari at 7, n. 4) That is to say, Justice Griffin could not logically have voted to uphold the forfeiture of Tina Bennis' interest in the Bennis automobile without rejecting her constitutional claim.[1]

Respondent cannot and does not challenge this inescapable conclusion regarding the meaning of Justice Griffin's vote in support of the Michigan Supreme Court judgment. Indeed, respondent's brief implicitly acknowledges this fact by consistently characterizing the plurality opinion as the decision of the Court for purposes of this certiorari petition. (See Respondent's Brief at 4, 5, 9, 10) Thus, for example, respondent states that "the Supreme Court found no constitutional violation. . ." (Id. at 4), that "[t]he Michigan Supreme Court. . . concluded [that] the abatement. . .was not constitutionally infirm" (Id. at 9), and that "the Court held that there was no constitutional violation. . ." (Id. at 10).

Likewise, the Wayne County Prosecutor does not and cannot challenge the fact that the three dissenting justices in Bennis also rejected Tina Bennis' constitutional claim, or at least the due process component of her claim. (See Petition for Certiorari at 4-5) Finally, respondent does not take issue with the uncontrovertible fact that, if the Supreme Court were to grant

[1]Tina Bennis also pointed out that, on at least one previous occasion, this Court accepted jurisdiction to review a state supreme court judgment where there was no opinion for the court, but instead only two concurring opinions, and where one of the concurring opinions rested on adequate and independent federal grounds, while the other did not. See United Air Lines v. Mahin, 410 U.S. 623 (1973) Thus, even if Justice Griffin's vote had either implicitly or explicitly been premised on an adequate and independent state ground, Supreme Court jurisdiction would still be present. (Petition for Certiorari at 6-7)

certiorari and reject the constitutional rule endorsed in Bennis, the judgment of the Michigan Supreme Court as to Tina Bennis would necessarily be altered. (See Petition for Certiorari at 8) In other words, there is no possibility that any decision of this Court correcting the view of federal constitutional law expressed by the Michigan Supreme Court in Bennis would be merely advisory. Taken together and individually, these factors provide a more than adequate basis for the exercise of Supreme Court jurisdiction here.

The argument against the existence of jurisdiction advanced by the Wayne County Prosecutor is not based on any disagreement with the bases for jurisdiction discussed above and set forth in the petition. What the Wayne County Prosecutor contends instead is that the "[t]he Michigan Supreme Court's decision evidences an adequate and independent state ground for its holding, which was formulated after consideration of the constitutional claim made." (Respondent's Brief at 5) Respondent suggests that in addition to relying on federal constitutional cases, the Michigan Supreme Court opinion in Bennis also relied on state (constitutional) cases, thereby establishing an adequate and independent state ground for its holding.

The Wayne County Prosecutor concedes, as it must, that in rejecting Tina Bennis' constitutional claim, the Michigan high court considered the U.S. Supreme Court decisions in Van Oster v. Kansas, 272 U.S. 465 (1926) and Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). (Respondent's Brief at 9, 10)[2] Respondent further acknowledges, as it

[2]The Michigan Supreme Court also cited to The Palmyra, 25 U.S. (12 Wheat.) 1 (1827); United States v. The Little Charles, 26 F. Cas. 979 (1818), Dobbins Distillery v. United States, 96 U.S. 395 (1877), and Harmony v. United States, 43 U.S. (2 How.) (1844). Bennis, 447 Mich. at 740, n. 32.

must, that the Court concluded on the basis of these federal cases that the forfeiture of Tina Bennis' interest in the automobile gave rise to no constitutional violation. (Id. at 10)

Respondent then makes the conclusory--and completely unsupportable--assertion that because "Michigan law on the issue was next considered, and the court held that there was no constitutional violation. . .," there exists "an adequate and independent state ground" to support the decision. (Respondent's Brief at 10) That assertion finds absolutely no support in the text of the Michigan Supreme Court opinion. Only two Michigan cases were cited in the Court's discussion of Tina Bennis' constitutional claim, and neither case even addressed any state (or, for that matter, federal) constitutional issues. Bennis, 447 Mich. at 741-42. Instead, those two cases merely construed the meaning of the statutory innocent owner exemption provided for in another statute (the Michigan drug forfeiture statute).

In one of those cases, People v. One 1979 Honda Automobile, 362 N.W.2d 860 (1984), the Michigan Court of Appeals held that the statutory exemption did not apply to a co-owner of an automobile who had no knowledge of the illegal use of the car by the other co-owner. 362 N.W.2d at 862. But as the Michigan Supreme Court readily acknowledged in Bennis, "[t]he unconstitutionality of the forfeiture was not even considered" in that case. Bennis, 447 Mich. at 742. The holding in the other case cited in the Bennis opinion, In re Forfeiture of $53.00, 444 N.W.2d 182 (1989), also was confined to the issue of the proper construction of the innocent owner defense in the Michigan drug forfeiture statute. Indeed, that panel of the Michigan Court of Appeals reached precisely the opposite conclusion regarding the scope of the statutory defense. 444 N.W.2d at 189; see also Bennis, 447 Mich. at 742, n. 35 (discussing case and noting that decision was based on statutory, rather than constitutional, grounds). The

Michigan cases cited in Bennis did not even address constitutional issues regarding the government's power to forfeit an innocent co-owner's property. Thus, their citation by the Michigan Supreme Court could not have created an adequate and independent state ground for the decision that would deprive this Court of jurisdiction.

Respondent's citation to this Court's decision in Michigan v. Long, 463 U.S. 1032 (1983) in support of its jurisdictional position is completely unavailing. (Respondent's Brief at 5) In Long, the United States Supreme Court established a presumption that jurisdiction exists "when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." Long, 463 U.S. at 1042. The state court decision for which review was sought in Long was a Michigan Supreme Court decision that referred to both the state and federal constitutions in declaring a search to be unconstitutional. The Michigan Supreme Court opinion in Long cited to no state constitutional cases in support of its holding, however. Instead, the Michigan court relied solely on its interpretation of United States Supreme Court cases in concluding that the search was unconstitutional.

The United States Supreme Court held that, because the state ground articulated by the Michigan Supreme Court was not independent of the federal ground, jurisdiction to review the Long decision was present. In so holding, the Court explained that even if the state constitution "has been interpreted to provide independent protection for certain rights also secured under the Fourth Amendment, it fairly appears in this case that the Michigan Supreme Court rested its decision primarily on federal law." 463 U.S. at 1044.

This case presents an even stronger basis for Supreme Court jurisdiction than did Long.

for here the Michigan Supreme Court opinion rests exclusively on federal law. Unlike the opinion in Long, the Bennis opinion does not even refer to the Michigan Constitution. It likewise relies on no state cases deciding state constitutional issues. The only sources of constitutional law relied upon in Bennis are U.S. Supreme Court cases that decided federal constitutional issues.

More fundamentally, in this case, in contrast to Long, the Michigan Supreme Court upheld the validity of a statute and its application against constitutional challenge. Where a state court "upholds a particular action on the ground that it offends neither federal nor state law, then the Supreme Court has power to review the state court judgment--though on the federal question only." Stern, Gressman, et al., Supreme Court Practice 147-48 (7th Ed. 1993) (citation omitted) (emphasis in original). Thus, even if the Bennis decision is read as having held that the nuisance abatement statute and its application to Tina Bennis passed muster under both the Michigan Constitution and the federal Constitution, this Court would still have power to review the Michigan Supreme Court's holding as relates to the federal Constitution. In short, respondent's assertion that the Bennis opinion evinces an adequate and independent state ground in support of the judgment is completely without merit.

REASONS FOR GRANTING CERTIORARI

The Wayne County Prosecutor's brief challenges only one of the several factors advanced by petitioner in support of granting certiorari in this case. Respondent makes the anomalous argument that the lack of a statutory exemption for innocent owners in the Michigan nuisance statute, rather than favoring Supreme Court review of this case, actually militates against it.

Respondent states repeatedly that the Michigan nuisance abatement statute contains no statutory exemption for innocent owners and specifically allows for forfeiture of an innocent owner's property, as if this fact somehow establishes the constitutionality of the statute and its application to Tina Bennis. (See Respondent's brief at 2, 3, 5, 7, 8, 9) Thus, for example, respondent asserts that "[s]ince there is no specific statutory exemption for 'innocent owners' as is found in many narcotic forfeiture provisions, this Court is not faced with the dilemma presented by those matters: loss of property with no knowledge on the part of the owner." (Respondent's Brief at 8)

Respondent's argument is, to put it mildly, difficult to comprehend. It obviously begs the question to suggest that the Michigan nuisance abatement statute or its application to Tina Bennis comports with the Fifth and Fourteenth Amendments just because the statute expressly authorizes the taking of an innocent owner's property and was applied in a manner consistent with that express authorization. Indeed, the fact that the statute contains no exemption for innocent owners--and even goes so far as to expressly include innocent owners within its reach--is exactly what gives rise to and necessitates resolution of the constitutional issue. Just two years ago, this Court reserved decision on the same constitutional issue presented here precisely because the drug forfeiture statute in question contained an exemption for innocent owners. See Austin v. United States, 509 U.S. ___, 125 L. Ed. 2d 488, 502 & n. 10 (1993) (stating that it was once again reserving the question "whether it would comport with due process to forfeit the property of a truly innocent owner" because "the forfeiture provisions at issue here exempt 'innocent owners'.") The clear implication was that the Court would have decided this "serious" constitutional issue if the federal drug forfeiture statute had not provided for such an exemption.

Id. The fact that the Michigan legislature has expressly chosen not to exempt "innocent owners" from the scope of the nuisance abatement statute, and that the statute was applied so as to effect a taking of property from an innocent owner, is plainly a consideration which (together with the other factors discussed in the petition) supports granting the writ of certiorari in this case.

CONCLUSION

For all of the reasons set forth in this brief and in her petition, Tina Bennis' petition for a writ of certiorari should be granted.

Respectfully submitted,

Stefan B. Herpel, P.C.

By: Stefan B. Herpel
Stefan B. Herpel (P-34676)
Attorney for Petitioner
206 S. Fifth Ave.
Suite 200
Ann Arbor, MI 48104
(313) 930-0852

Dated: May 9, 1995

Stefan B. Herpel, P.C.
Attorney at Law

206 S. Fifth Ave., Suite 200
Ann Arbor, MI 48104
Phone: (313) 930-0852

Licensed to practice law in
Michigan and California

May 9, 1995

Kathy Tycz
Documents Control
United States Supreme Court
1 First St., NE
Washington, D.C. 20543

Re: Bennis v. Michigan; No. 94-8729

Dear Ms. Tycz:

As I advised in my telephone conversation with you this afternoon, I am enclosing 12 copies of Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari, in connection with the above-referenced case, along with a proof of service.

Thank you again for your assistance in this matter.

Very truly yours,

Stefan B. Herpel

Stefan B. Herpel

RECEIVED
MAY 10 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Enc.

cc: Larry L. Roberts, Esq. w/enc.
Timothy A. Baughman, Esq. w/enc.

No. 94-8729

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

TINA B. BENNIS, Petitioner

v.

STATE OF MICHIGAN ex rel. WAYNE COUNTY PROSECUTOR, Respondent

---

On Petition for a Writ of Certiorari to the
Michigan Supreme Court

PROOF OF SERVICE

RECEIVED
MAY 10 1995
OFFICE OF THE CLERK
SUPREME COURT, U.S.

STEFAN B. HERPEL, P.C.
Stefan B. Herpel
206 S. Fifth Ave., Suite 200
Ann Arbor, Michigan 48104
(313) 930-0852
Counsel for Petitioner

Stefan B. Herpel, counselor for petitioner and a member of the Supreme Court bar, states that on May 9, 1995 he served a copy of Petitioner's Reply Brief in Support of Petition for a Writ of Certiorari on Larry L. Roberts and Timothy A. Baughman by placing a copy of that document in each of two envelopes, postage pre-paid, one of which was addressed to Larry L. Roberts, Esq., Assistant Prosecuting Attorney, 1441 St. Antoine, 11th Floor, Detroit, MI 48226, and the other to Timothy A. Baughman, Chief of Research, Training, and Appeals, Wayne County Prosecutor's Office, 1441 St. Antoine, Detroit, Michigan 48226, and by depositing each envelope in the U.S. Mail.

Stefan B. Herpel 5-9-95

Stefan B. Herpel Date